STATE OF MICHIGAN

COURT OF APPEALS

MARY DELANEY,

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED
March 16, 1999

No. 202391
Court of Claims
LC No. 95-015982 CM

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). We reverse and remand.

While attending a private wedding reception held in the Lincoln Room of defendant's Kellogg Center, plaintiff fell from a platform on which the head table sat sixteen inches above the floor. Plaintiff filed suit against defendant, alleging negligence in failing to provide adequate railings for the platform, improper assembly, and inadequate illumination. Plaintiff argues on appeal that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) and (10).

In reviewing a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7), this Court must review the complaint to determine whether plaintiff has pleaded facts justifying application of an exception to governmental immunity. *Johnson v Detroit*, 457 Mich 695, 700-701; 579 NW2d 895 (1998). The contents of the complaint are accepted as true unless specifically contradicted by affidavits or other documentation submitted by the moving party. *Sewell v Southfield Public Schools*, 456 Mich 670, 674; 576 NW2d 153 (1998).

Because summary disposition was also granted pursuant to MCR 2.116(C)(10), we must also include consideration of the documentary evidence submitted by the parties. *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether factual support exists for a claim. *Panich v Iron Wood Products Corp*, 179 Mich App 136, 139; 445 NW2d 795 (1989). In deciding such a motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence, MCR

2.115(G)(5), and give the nonmoving party the benefit of every reasonable doubt. *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995). The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial. *Id*. The grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996).

Pursuant to Const 1963, art 8, § 5,[1] defendant Michigan State University is a governmental unit that enjoys statutory governmental immunity from tort liability. MCL 691.1401(c), (d); MSA 3.996(101)(c), (d). MCL 691.1407(1); MSA 3.996(107)(1) provides in pertinent part that "[e]xcept as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the governmental agency is engaged in the exercise or discharge of a governmental function." "Governmental function" has been defined by the Legislature as "an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f); MSA 3.996(101)(f). This definition has been broadly applied to require only that "there be *some* constitutional, statutory, or other legal basis for the activity in which the governmental agency was engaged." *Pawlak v Redox Corp*, 182 Mich App 758, 764; 453 NW2d 304 (1990), citing *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 253; 393 NW2d 847 (1986) (emphasis in original). If an activity conducted by a governmental entity is considered a governmental function, then such activity is immune from tort liability unless one of the exceptions to governmental immunity applies. MCL 691.1401 *et seq*.; MSA 3.996(101) *et seq*.; *Harris v Univ of Michigan Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996).

One such exception, pleaded herein by plaintiff, is the "proprietary function" exception set forth in MCL 691.1413; MSA 3.996(113):

> The immunity of the governmental agency shall not apply to actions to recover for bodily injury or property damage arising out of the performance of a proprietary function as defined in this section. Proprietary function shall mean any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees. No action shall be brought against the governmental agency for injury or property damage arising out of the operation of a proprietary function, except for injury or loss suffered on or after July 1, 1965.

In a recent opinion, *Coleman v Kootsillas*, 456 Mich 615, 621-622; 575 NW2d 527 (1998), our Supreme Court articulated the appropriate analysis to be used in determining whether an activity is proprietary in nature:

> We previously held that the definition of proprietary function is clear and unambiguous. *Hyde* [*v Univ of Michigan Bd of Regents*, 426 Mich 223; 393 NW2d 847 (1986)], *supra* at 257. Two tests must be satisfied: The activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees. *Id*. at 258.

In determining whether the agency's primary purpose is to produce a pecuniary profit, we stated that certain considerations should be taken into account. The first is whether a profit is actually generated.

> "The fact that a governmental agency pursues an activity despite consistent losses may be evidence that the primary purpose is not to make a pecuniary profit, but it is not conclusive evidence. Conversely, the fact that the activity consistently generates a profit may evidence an intent to produce a profit." [*Id*. at 258 (citations omitted).]

The second consideration is "where the profit generated by the activity is deposited and how it is spent."

> "If the profit is deposited in the governmental agency's general fund or used to finance unrelated functions, this could indicate that the activity at issue was intended to be a general revenue-raising device. If the revenue is used only to pay current and long-range expenses involved in operating the activity, this could indicate that the primary purpose of the activity was not to produce a pecuniary profit." [*Id*. at 259 (citations omitted).]

As this Court recognized in *Harris, supra* at 692:

> [T]he broader and more extensive the definition of "governmental function," the less room there is for finding a proprietary function exception. Indeed . . . once the governmental function analysis is made and it has been determined that the activity has the indicia of a traditional governmental function, the conclusion is virtually inevitable that the activity in question is not proprietary. However, we do not, and cannot, conclude that for all cases a finding of governmental function forecloses any analysis of the proprietary function exception.

The facts of the present case may indeed provide the unusual circumstances that allow for application of the exception. On the one hand, defendant's operation of the Kellogg Center has the indicia of a traditional governmental function. As indicated in affidavits submitted by defendant in support of its motion, the Kellogg Center is a residential learning and conference center that provides both conventional and clinical learning opportunities to university students. It has meeting rooms, guest rooms, a school of hospitality business laboratory and amphitheater, banquet rooms, and several classrooms. The Kellogg Center houses defendant's adult continuing education programs and the academic and clinical undergraduate training program for the school of hospitality business students. Many of the employees and interns at the Kellogg Center are students in the school of hospitality program. The vice-provost for the university outreach program and defendant's chief financial officer both averred that the primary mission of the Kellogg Center was to provide lifelong education and undergraduate training. The financial officer further averred that the Kellogg Center has operated with a negative cash flow for the three fiscal years prior to 1997, but that if a month of revenue exceeds that month's operating expenses, surplus revenue would be used to offset any operating losses for the other months and fund capital projects for maintaining the center. Hence, defendant argues that the Kellogg

Center is engaged in training its college students in the area of hospitality management and its primary purpose is therefore education, not pecuniary profit.

On the other hand, plaintiff alleges in her complaint that because the Lincoln Room in the Kellogg Center was rented out for the purpose of a private wedding reception for which a fee was obtained, defendant was engaged in a proprietary function, thus excepting it from statutory immunity. Plaintiff argues that the Kellogg Center bears the hallmarks of a for-profit hotel. It operates similarly to, and competes with, private hotels and conference centers in the area. The center hosts 1500 events each year, nearly fifty percent of which are private bookings for seminars, conferences, or social events such as the wedding reception attended by plaintiff in the Lincoln Room. The Kellogg Center charges fees for these private functions. In support of her argument that the Kellogg Center was not conducted primarily to meet defendant's educational needs, but to produce a profit, plaintiff referenced the deposition testimony[2] of Joel Heberlein, Kellogg Center general manager since 1993. Heberlein testified as to the goals of the Kellogg Center:

> *Q.* So the Kellogg Center is operated primarily as a goal to make a profit?
>
> *Mr. Kiley*: Objection. Mr Heberlein can only speak to what his goals are.
>
> *Q.* (By Mr. Konheim): You are – then I'll direct it to you. As general manager of the Kellogg Center, the Kellogg Center is conducted primarily to make a profit; correct, as you are general manager?
>
> *A.* The facility is there as a continuing education facility for the University.
>
> *Q.* And it also is being operated, as you said, in order to make a profit, and that was one of your primarily [sic] goals coming in; correct?
>
> *A.* As far as cash flow, to create a surplus?
>
> *Q.* Yes.
>
> *A.* Yes.
>
> *Q.* So you, as general manager, just you as general manager, operate the Kellogg facility with a primary goal of making a profit; correct?
>
> *A.* Yes.

Cogent to our consideration of plaintiff's appeal is *Dohm v Twp of Acme*, 354 Mich 447; 93 NW2d 323 (1958), which precedes the current measure of a proprietary function but is nonetheless pertinent and factually analogous. In *Dohm*, the plaintiff was attending a wedding anniversary celebration at the Acme Township Hall. Plaintiff left the hall by a rear entrance for the purpose of going to an outhouse maintained by the defendant township. While descending the steps, she fell and was

injured. The *Dohm* Court, *supra* at 453-454, concluded that the township was engaged in the exercise of a proprietary function:

> In the case at bar it may be assumed that the town hall was erected primarily in connection with the exercise of governmental functions of the township. The proofs in the case disclose that approximately 6 meetings of the township board are held there each year, and that elections are also conducted on the first floor of the building. Obviously the use of the hall for the holding of an anniversary party of the character here involved had no connection with the exercise of any governmental function. It was a purely private transaction and of the character that the owner of a building adapted to the holding of such gatherings might enter.
>
> The fee charged in the instant case was small and the testimony indicates that the premises, other than the second floor, are rented not more than 12 or 15 times per year. . . . The testimony justified the inference that the money received from rentals is sufficient to maintain the place for the proper carrying on of governmental functions therein as well as for private parties. The amount of rental charged is not of controlling significance. The determining factor is the nature and purpose of the use on the occasion of the injury suffered by Mrs. Dohm. Such use was not in any way a part of, or connected with, the exercise of a governmental function.
>
> We conclude as to the transaction here in question that the township was engaged in a proprietary activity and subject to liability on the ground of negligence in failing to maintain the hall in a proper condition for use by the plaintiff Alta Marie Dohm at the time of her injury.

In light of this relevant precedent and reviewing the evidence on record in this case and all reasonable inferences arising therefrom, we conclude that, at this preliminary juncture in the present proceedings, plaintiff has created a genuine issue of material fact as to whether the activity in question at the Kellogg Center was conducted primarily for the purpose of producing a pecuniary profit so as to fall within the proprietary function exception to governmental immunity. Under MCR 2.116(C)(7) and (10), plaintiff has submitted allegations and proofs sufficient to withstand defendant's motion for summary disposition on the basis of governmental immunity.

Plaintiff also argues on appeal that defendant's use of the elevated platforms in the Lincoln Room of the Kellogg Center for the wedding reception constituted a "building defect" within the scope of the public building exception to statutory governmental immunity, MCL 691.1406; MSA 3.996(106). However, in her answer to defendant's motion for summary disposition, plaintiff conceded and stipulated that the public building exception does not apply to her tort claim. As a result, the trial court did not analyze whether the public building exception applied to these circumstances. Generally, an issue is not properly preserved if it is not raised before and addressed by the trial court. *Alford v Pollution Control Inds*, 222 Mich App 693, 699; 565 NW2d 9 (1997). Therefore, we decline to address this issue on appeal.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald

[1] Const 1963, art 8, § 5 provides in pertinent part:

> [T]he trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University. . . . Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds.

[2] Only two pages of Heberlein's deposition testimony are contained in the lower court record.